IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| TESSA G.,<br><br>Plaintiff,<br><br>v.<br><br>XAVIER BECERRA, S*ecretary, United States Department of Health and Human Services*,<br><br>Defendant. | : | CIVIL ACTION NO.<br>1:23-cv-02665-LMM-RGV |

**ORDER**

This case comes before the Court on Plaintiff's Partial Objections [38] to the Magistrate Judge's Report and Recommendation ("R&R") [32] granting in part and denying in part Defendant's Second Motion to Dismiss [16] and denying as moot Defendant's First Motion to Dismiss [10]. After due consideration, the Court enters the following Order:

## I. LEGAL STANDARD

Under 28 U.S.C. § 636(b)(1), the Court reviews the Magistrate Judge's Report and Recommendations for clear error if no objections are filed. 28 U.S.C. § 636(b)(1). If a party files objections, however, the district court must review *de*

*novo* any part of the Magistrate Judge's disposition that is the subject of a proper objection. Id.

Additionally, the Court recognizes that Plaintiff is appearing *pro se*. Thus, the Complaint is more leniently construed and "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007); Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam). But nothing in that leniency excuses a plaintiff from complying with threshold requirements of the Federal Rules of Civil Procedure. See Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1998). Nor does this leniency require or allow courts "to rewrite an otherwise deficient pleading [by a *pro se* litigant] in order to sustain an action." GJR Invs., Inc. v. Cnty. of Escambia, 132 F.3d 1359, 1369 (11th Cir. 1998), *overruled on other grounds by* Iqbal, 556 U.S. 662.

## II. DISCUSSION

In the R&R, the Magistrate Judge recommended denying Defendant's Second Motion to Dismiss as to Counts One and Three of Plaintiff's Complaint, which allege claims for discriminatory termination and retaliation under the Americans with Disabilities Act ("ADA"). Dkt. No. [32]. The Magistrate Judge also recommended denying Defendant's First Motion to Dismiss as moot. Id. Neither party has filed objections as to these portions of the R&R. Accordingly, the Court has conducted a clear-error review of these recommendations and, finding no such error, adopts these portions of the R&R as its Order. The Court therefore denies Defendant's Second Motion to Dismiss, Dkt. No. [16], as to

Counts One and Three of Plaintiff's Complaint and denies Defendant's First Motion to Dismiss, Dkt. No. [10], as moot.

The Magistrate Judge also recommended granting Defendant's Second Motion to Dismiss, Dkt. No. [16], as to the remaining counts in Plaintiff's Complaint. See Dkt. No. [32]. Specifically, the Magistrate Judge recommended dismissing: (A) Plaintiff's ADA claim for failure to accommodate (Count Two); (B) Plaintiff's ADA claim for illegal disclosure (Count Four); and (C) Plaintiff's constitutional claim for violations of the Due Process Clause of the Fifth Amendment (Count Five). Id. at 19–25, 33–38. Plaintiff objects to the portions of the R&R dismissing these claims. Dkt. No. [38]. Defendant has not filed any objections to the R&R but has responded to Plaintiff's objections. Dkt. No. [39]. Below, the Court addresses Plaintiff's objections to the dismissal of her: (A) failure-to-accommodate claim; (B) illegal disclosure claim; and (C) constitutional due process claim.

### A. Failure to Accommodate

First, the Magistrate Judge recommended dismissing Count Two of Plaintiff's Complaint, which asserts that Defendant refused to accommodate her epilepsy condition. Dkt. No. [32] at 19–25. The Magistrate Judge reasoned that dismissal was warranted because Plaintiff failed to exhaust her administrative remedies—specifically by omitting any reference to a failure-to-accommodate claim in her complaint to the Equal Employment Opportunity Commission ("EEOC"). Id. Plaintiff objects to this finding, arguing that she has fully exhausted

Count Two, because the facts underlying this claim overlap with the facts supporting her wrongful termination and retaliation claims. Dkt. No. [38] at 3–7. Defendant responds that the Magistrate Judge correctly found that Plaintiff failed to exhaust her failure-to-accommodate claim. Dkt. No. [39] at 4–15.

The Court agrees with the Magistrate Judge. Generally, a failure-to-accommodate claim under the ADA is a discrete claim that must be exhausted separately from a discrimination or retaliation claim. See Booth v. City of Roswell, 754 F. App'x 834, 837 (11th Cir. 2018) (per curiam) (holding that the plaintiff failed to exhaust a failure-to-accommodate claim where his EEOC charge alleged only that he was discriminated against because of his disability). Although Plaintiff points to certain facts in the complaint that may be probative of both a failure-to-accommodate claim and a discrimination claim, this does not suffice to exhaust both claims. Instead, Plaintiff has exhausted the failure-to-accommodate claim only if it "is like or related to, or grew out of, the allegations contained in the EEOC charge." Batson v. Salvation Army, 897 F.3d 1320, 1328 (11th Cir. 2018) (quoting Gregory v. Ga Dep't of Hum. Res., 355 F.3d 1277, 1280 (11th Cir. 2004)). Here, as the Magistrate Judge pointed out, Plaintiff's EEOC complaint contained no mention of Plaintiff requesting an accommodation or Defendant denying such a request. See Dkt. No. [16-2] at 15–20. Indeed, the EEOC complaint centers on Defendant's demotion and termination of Plaintiff—not any

unsatisfied request for accommodation.[1] Id. Because Plaintiff's failure-to-accommodate claim is separate from the claims in her EEOC complaint, it has not been exhausted and is administratively barred. The Court therefore overrules Plaintiff's objection and dismisses Count Two of Plaintiff's Complaint.

**B. Illegal Disclosure**

Next, the Magistrate Judge recommended dismissing Count Four of Plaintiff's Complaint, which asserts that Defendant violated the ADA by illegally disclosing her epilepsy condition. Dkt. No. [32] at 19–25. The Magistrate Judge found that this claim was not properly exhausted for the same reasons that Plaintiff's failure-to-accommodate claim was not exhausted. Id. Plaintiff objects, contending that she did not discover her illegal disclosure claim until after the EEOC investigation had commenced. Dkt. No. [38] at 8–9. Plaintiff also argues that the illegal disclosure claim is reasonably related to her discriminatory termination claim. Id. Defendant responds that the Magistrate Judge properly recommended dismissing Plaintiff's illegal disclosure claim because Plaintiff failed to exhaust this claim. Dkt. No. [39] at 15–18.

[1] Plaintiff points to facts in her EEOC complaint showing that Defendant refused to provide Plaintiff a performance review, that Defendant was "angry" following her request to reschedule a meeting, and that Defendant required Plaintiff to drive for work. Dkt. No. [38] at 4–5. However, as Defendant points out, none of these allegations suggest that Plaintiff requested accommodations because of her epilepsy condition. Dkt. No. [39] at 4–11. Thus, Plaintiff's failure-to-accommodate claim is not sufficiently connected to the allegations in her EEOC complaint.

The Court agrees with the Magistrate Judge. Once again, Plaintiff's illegal disclosure claim is completely absent from Plaintiff's EEOC complaint. See Dkt. No. [16-2] at 15–20. Although Plaintiff argues that she exhausted this claim by including it in a motion for sanctions she filed with the EEOC months after its investigation began, Dkt. No. [38] at 9, her only support for this position is a few sentences in the motion stating that a witness in the investigation knew about Plaintiff's epilepsy. Dkt. No. [22-1] at 39. This is plainly insufficient to give the EEOC the "first opportunity to investigate the alleged discriminatory practices," and Plaintiff's illegal disclosure claim cannot "reasonably be expected to grow out of" the charges of discrimination in her EEOC complaint. Gregory, 355 F.3d at 1279–80 (cleaned up). Further, Plaintiff complains that she did not discover the illegal disclosure claim until after the EEOC process had begun, but she does not explain why this excuses her duty to separately exhaust the claim. Thus, Plaintiff has not exhausted Count Four of her Complaint, and the Court overrules Plaintiff's objection to the dismissal of this claim.

### C. Constitutional Due Process

Finally, the Magistrate Judge recommended dismissing Count Five of Plaintiff's Complaint, which asserts a constitutional due process claim based on Defendant's failure to abide by the termination process in Plaintiff's employment contract. Dkt. No. [32] at 33–38. The Magistrate Judge found that this claim should be dismissed because Plaintiff has failed to show a waiver of sovereign immunity. Id. Plaintiff objects to this recommendation, arguing that sovereign

immunity does not bar her claim for injunctive relief.[2] Dkt. No. [38] at 9–12. Specifically, Plaintiff contends that she set forth a valid waiver of sovereign immunity by citing Section 702 of the Administrative Procedure Act ("APA") in her Complaint. Id. at 10–11; Dkt. No. [15] ¶ 5 (quoting 5 U.S.C. § 702). Defendant responds that the Magistrate Judge correctly dismissed Plaintiff's due process claim on the ground of sovereign immunity. Dkt. No. [39] at 19–20.

The Court agrees with the Magistrate Judge.[3] "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." King v.

[2] Plaintiff also argues that the Magistrate Judge erred in finding that she failed to respond to Defendant's statute of limitations argument. Dkt. No. [38] at 11–12. Further, Plaintiff contends that the applicable statute of limitations should be tolled due to the doctrine of equitable tolling. Id. However, the Magistrate Judge did not rely on the statute of limitations in reviewing Plaintiff's due process claim. See Dkt. No. [32] at 35 n.12. Instead, the Magistrate Judge relied on the statute of limitations only in recommending that Plaintiff's Administrative Procedure Act ("APA") and breach of contract claims be dismissed. Id. But Plaintiff does not object to the dismissal of her APA claims and concedes that her Complaint does not contain a breach of contract claim. Dkt. No. [38] at 11 n.7. Thus, the Court need not address Plaintiff's statute of limitations or equitable tolling arguments.

[3] The Magistrate Judge suggested that, because Plaintiff's APA claims were subject to dismissal, Plaintiff could not establish a waiver of sovereign immunity based on the APA. Dkt. No. [32] at 35 n.12. However, this proposition is incorrect—sovereign immunity *can* be waived by the APA even where the plaintiff does not assert a substantive APA claim in their complaint. See Tinnerman v. United States, No. 21-14023, 2022 WL 3654844, at *4 (11th Cir. Aug. 25, 2022) (finding that 5 U.S.C. § 702 "operates as a general waiver of sovereign immunity for suits against the Untied States seeking nonmonetary relief, even if the claim does not arise under the APA"); see also Fla. Marine Contractors v. Williams, No. 2:03-cv-229, 2004 WL 964216, at *3 (M.D. Fla. Apr. 22, 2004) (noting that "Section 702 of the APA is a general waiver of sovereign immunity without a limitation on whether a cause of action under the APA is also pled" (citing Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1555 (11th Cir. 1985))). Although

United States Gov't, 878 F.3d 1265, 1267 (11th Cir. 2018) (quoting Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475 (1994)); see also Sharma v. Drug Enf't Agency, 511 App'x 898, 901 (11th Cir. 2013) (per curiam). Even where a plaintiff seeks declaratory and injunctive relief, the plaintiff must "still establish a valid waiver of sovereign immunity." Kight v. U.S. Dist. Ct., N. Dist. Ga., 681 F. App'x 882, 883–84 (11th Cir. 2017). "Plaintiff bears the burden of showing Congress's unequivocal waiver of sovereign immunity." City of Pembroke Pines v. Fed. Emergency Mgmt. Agency, 494 F. Supp. 3d 1272, 1282 (S.D. Fla. 2020) (quoting St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency, 556 F.3d 307, 315 (5th Cir. 2009)).

Here, Plaintiff's waiver argument rests solely on the APA. Dkt. No. [38] at 10–11. The APA waives sovereign immunity only as to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. As an initial matter, "the plaintiff must identify some 'agency action' affecting him in a specific way, which is the basis of his entitlement for judicial review." Alabama-Coushatta Tribe of Tex. v. United States, 757 F.3d 484, 489 (5th Cir. 2014) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990)).

Plaintiff has not identified a final agency action for which she is seeking judicial review. See Dkt. No. [15]. Instead, Plaintiff merely cites Section 702 of the

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the Court does not agree with this particular portion of the Magistrate Judge's analysis, the Court nevertheless agrees with the Magistrate Judge that Plaintiff has not set forth a valid waiver of sovereign immunity based on the APA.

APA in her Complaint without explaining how it waives sovereign immunity in this case. Id. ¶ 5. Further, although Plaintiff's due process claim appears to be based on Defendant's alleged failure to abide by the termination process in her employment contract, id. ¶¶ 230–45, it is not clear that this qualifies as an "agency decision" under Sections 702 and 704 of the APA.[4] See Storey v. Rubin, 976 F. Supp. 1478, 1482–83 (N.D. Ga. 1997) (rejecting the plaintiff's APA claim because the plaintiff's rights in the employment context were not related to a "specific administrative proceeding or the manner in which [such a proceeding] is carried out"). Thus, Plaintiff has not satisfied her burden of showing an unequivocal waiver of sovereign immunity. The Court therefore dismisses Count Five of Plaintiff's Complaint.

[4] To the extent Plaintiff is seeking a waiver of sovereign immunity based on a final decision of the EEOC, this attempt fails for at least two reasons. First, the EEOC is not named as a defendant in this action. See Dkt. No. [15]. Second, "[c]ourts have repeatedly held that the United States has not waived sovereign immunity for suits against the EEOC based on the EEOC's handling of an employment discrimination charge." Moore v. United States, No. CV411-313, 2012 WL 1040829, at *2–3 (S.D. Ga. Mar. 28, 2012) (quoting McKoy v. Potter, No. 08-cv-9428, 2009 WL 1110692, at *5 (S.D.N.Y. Apr. 21, 2009)), adopted by 2012 WL 1898875 (S.D. Ga. May 23, 2012).

## III. CONCLUSION

In accordance with the foregoing, the Court **OVERRULES** Plaintiff's Partial Objections [38], and adopts the Magistrate Judge's Report and Recommendation [32], as the opinion of this Court. Defendant's Second Motion to Dismiss [16] is **GRANTED in part** and **DENIED in part**: the Court dismisses Counts Two, Four, and Five of Plaintiff's Complaint, but Plaintiff's other claims remain. Defendant's First Motion to Dismiss [10] is **DENIED as moot**. The Clerk is **DIRECTED** to refer this matter to the Magistrate Judge for further proceedings.

**IT IS SO ORDERED** this 18th day of September, 2024.

**Leigh Martin May**
**United States District Judge**